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Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-775

W. WOOD PRINCE AND JAMES F. DONOVAN, AS TRUSTEES OF THE CENTRAL MANUFACTURING DISTRICT,
Plaintiffs-Respondents,

vs.

ROYAL INDEMNITY COMPANY,
Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

PAGE

The Opinions Below 2

Grounds on Which the Jurisdiction of This Court Is Invoked 2

Questions Presented 3

Constitutional and Statutory Provisions Involved 5

Statement of the Case 6

Argument 12

I. Respondents' Conveyance of Properties Divested Any Interest Protected by the Policy of Insurance. The Court of Appeals' Refusal to be Bound by Illinois Law Is Violative of That Principle Founded in Constitutional Safeguards That, for Purposes of Diversity Jurisdiction, a Federal Court Is in Effect Only Another Court of the State 12

A. Preliminary—Proper Focus 12

B. The Court of Appeals' "Distinction" of the Illinois Rule on Insurable Interest Is Illusory; That Court Simply Substituted Its Own Opinion for Illinois Law Which Here Required That Judgment be Entered in Favor of Petitioner .. 15

C. Respondents Did Not Sustain the Required "Direct" Pecuniary Loss. The Indemnity Which Respondents Sought for Indirect Loss Is Afforded Only by "Errors and Omissions" Coverage; It Is Not Afforded Under the Policy of Property Insurance 23

II. The Refusal to Accept the Binding Principles of Illinois Law Is an Unconstitutional Abrogation of the Requirement That in Diversity Cases State Law Controls 30

Conclusion 32

Appendix A (The Opinion of The United States Court of Appeals) A1-8

Appendix B (The District Court's Opinion) A9-19

Appendix C (Stipulation of Facts Considered by the District Court) A20-31

Appendix D (The Order Denying the Petition for Rehearing) A32

TABLE OF CASES.

Agricultural Insurance Co. v. Clancey, 9 Ill. App. 137 (1881) 19

Bird v. St. Paul Fire & Marine Insurance Co., 224 N. Y. 47, 120 N. E. 86 (1918) 23

Bolling v. Sharpe, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 2d 88 (1965) 5, 31

Capps v. National Union Fire Insurance Co., 318 Ill. 350, 149 N. E. 247 (1925) 18

City of Nokomis v. Smith, 74 Ill. App. 2d 211, 219 N. E. 2d 776 (1966) 24

Danvers Mutual Fire Insurance Co. v. Schertz, 95 Ill. App. 656 (1900) 18

Downs v. Michigan Commercial Insurance Co., 157 Ill. App. 32 (1910) 18

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 2d 1188 (1937) 12, 30, 31

Estes v. Great American Ins. Co., 112 S. W. 2d 153 (1938) 21

Fidelity Union Trust Company v. Field, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 2d 109 (1940) 30

Fray v. National Fire Insurance Co., 341 Ill. 431, 173 N. E. 479 (1930) 18

Griffin v. Pfeffer Lumber Co., 285 Ill. 19, 120 N. E. 583 (1918) 18

Guaranty Trust Co. v. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2d 2079 (1945) 31

Hartford Accident & Indemnity Co. v. Della & Fine Land Co., 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 2d 1178 (1933) 31

Home Insurance Co. v. Dick, 281 U. S. 397, 50 S. Ct. 338, 74 L. Ed. 2d 926 (1929) 31

Home Insurance Co. v. Mendenhall, 164 Ill. 458, 463, 45 N. E. 1078 (1897) 17

Home Insurance Co. v. Peoria P. U. Ry. Co., 78 Ill. App. 137 (1889) 18

Illinois Mutual Fire Insurance Co. v. Andes Insurance Co., 67 Ill. 362, 363 (1873) 16

In Re Reynolds Estate, 94 Vt. 149, 105 A. 60 (1920) 24

Klefstad v. American Central Ins. Co., 207 F. 2d 288 (7th Cir., 1953) 10, 27

Lieberman v. Hartford Fire Insurance Co., 6 Ill. App. 3d 948, 287 N. E. 2d 38 (1972) 16

Lucena v. Craufurd, 2 B. & P. N. R. 269, 324, 127 Eng. Rep. 630, 651 (1805) 14

Lumberman's Mutual Insurance Co. v. Edmister, 412 F. 2d 351 (8th Cir., 1969) 22

Marcuse v. Upton, 9 La. App. 28, 118 So. 790 (1928) .. 21, 32

Pappas v. Insurance Co. of State of Pennsylvania, 54 Tenn. App. 640, 393 S. W. 2d 298 (1965) 21

Patterson v. Durand Farmers Mutual Fire Insurance Co., 303 Ill. App. 128, 24 N. E. 2d 740 (1940) 16

Pfeffer v. Farmers State Bank of Schaumburg, 263 Ill. App. 360, 370 (1931) 10, 13, 27

Pressly v. America, 14 N. C. App. 561, 188 S. E. 2d 734 (1972) 21

Prince v. Royal Indemnity Co., 404 F. Supp. 1076 (1975) 2, 15

Shadid v. American Druggist Fire Ins. Co. (Okla.), 386 P. 2d 311 (1963) 21

Welch v. Northern Assurance Co., 223 Ill. App. 77 (1921) 18

West v. American Telephone & Telegraph Co., 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 2d 139, 144 (1940) 3, 30

Whelan v. Massachusetts Bonding & Insurance Co., 205 Ill. App. 122 (1917, pet. lv. app. den.) 19

Woods v. Interstate Realty Co., 93 L. Ed. 2d 1527 31

Wriedt v. Beckenhauer, 183 Neb. 311, 159 N. W. 2d 822 (1968) 21

TEXT.

Couch on Insurance 2d § 24:13 (1960) 19, 25

Couch on Insurance § 24:100, §24:101 (1960) 20

Couch on Insurance § 44:2 (1960) 24

Appleman, Insurance Law & Practice § 2241 (1941) 20

22 Illinois Law & Practice: Insurance § 307 20

General Insurance, Magee, 4th Ed. p. 333 24

Principles of Insurance, Mehr & Cammach p. 373 24

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Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

THE OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit in the cause therein numbered 76-1175 was written by Circuit Judge Philip W. Tone and concurred in by Circuit Judge Walter J. Cummings and Circuit Judge Harlington Wood, Jr. The opinion, which is appended hereto in Appendix A *post*, is officially reported at 541 F. 2d 646 (1976). The opinion of the United States District Court for the Northern District of Illinois, Eastern Division was written by District Judge William J. Lynch, and which the Court of Appeals reversed and remanded, is set forth in Appendix B, hereto. This opinion is officially reported at 404 F. Supp. 1076 (1975).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i)

The judgment of the United States Court of Appeals in this cause was rendered on the 2nd day of September, 1976.

(ii)

A timely petition for rehearing was denied on the 22nd day of September, 1976. That order is appended hereto as Appendix D.

(iii)

The jurisdiction of this Court is invoked under United States Code, Title 28, Section 1254, which provides for review of the decisions of the United States Court of Appeals by Writ of Certiorari granted upon petition.

QUESTIONS PRESENTED.

This is a diversity case involving a question of insurance law—a matter of particular import to the state whose law was "construed" and to the insurance industry, an integral part of both the state and national economy. The primary issue is whether an insured vendor who has transferred by deed all of its right, title, and interest in property retains an insurable interest therein by "acknowledging" a legal liability to the vendee for its own negligence in failing to obtain the consent of the insurer of an assignment of a fire insurance policy insuring the property. The District Court for the Northern District of Illinois, Eastern Division, Lynch, District Judge, entered judgment in favor of the petitioner-insurer, pursuant to Illinois rule. The Court of Appeals, Tone, Circuit Judge, repudiated and rejected established Illinois rule that an insurable interest must be an interest in the property itself, and held that when an insured vendor undertook, on sale of the property, responsibility to obtain the consent to assignment of the insurer, and neglected to do so, insured vendor was liable to purchaser upon subsequent destruction of the property by fire and thus had an insurable interest to the extent of such liability despite the insurer never having consented to the assignment and despite the existence of a defense against the vendee based on its failure to make inquiry concerning delay in delivering consent, and in essence transforming a fire insurance policy into an errors and omissions policy to the extent of such liability.

The specific issues raised by this petition follow:

(a)

—whether this Court's 1940 decision in *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, 145, wherein this Court held that a federal Court "is not free to apply a different rule however

desirable it may believe it to be, and even though it may think that the state supreme Court may establish a different rule in some future litigation", remains a viable and enforceable guideline in diversity cases which serves to protect the rightful independence of state governments and to insure comity between those governments and the federal judiciary.

(b)

—whether the Court of Appeals' refusal to apply Illinois law constituted a violation of the 10th amendment to the United States Constitution and further, whether said refusal was an unjust discrimination against those subject to diversity jurisdiction and thereby—in contravention of the constitutional safeguards of the 5th amendment—rendered due process and equal protection of the law impossible.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

CONSTITUTIONAL PROVISIONS.

The Fifth Amendment to the Constitution of the United States, the pertinent part of which reads:

> ". . . nor shall any person . . . be deprived of . . . property, without due process of law[1] . . ."

The Tenth Amendment to the Constitution of the United States, which reads:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS INVOLVED.

United States Code, Title 28, Section 1652 (commonly known as Section 34 of the Judiciary Act), which provides:

> "The laws of several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

1. While the Fifth Amendment to the United States Constitution does not contain an explicit safeguard of an equal protection clause, such protection is generally derived from the "due process" clause of that Amendment. *Bolling* v. *Sharpe*, 347 U. S. 497, 98 L. Ed. 88, 74 S. Ct. 693 (1965).

STATEMENT OF THE CASE.

Basis for Federal Jurisdiction.

The basis for federal jurisdiction was diversity of citizenship and the presentation of a claim in excess of the requisite jurisdictional amount.

Prefatory Note.

Petitioner will limit its discussion to facts it deems necessary to place this case in proper perspective. Those facts stipulated by counsel which the District Court found relevant and material are included as Appendix C.

Defense.

By its answer to the complaint, Royal Indemnity Company (hereinafter referred to as "Royal") denied both its liability to plaintiffs for any sum whatsoever and that plaintiffs were injured, if at all, to the extent claimed (Recd. 34, 35).

In its answer, Royal further stated that long prior to May 27, 1973:

> "Plaintiffs sold, transferred and conveyed all of their right, title and interest in and to said buildings to the Prudential Insurance Company of America by Trustee's Deed dated January 4, 1973 and recorded in the office of the Recorder of Deeds, County of Cook and State of Illinois, on January 5, 1973 as Document 22 178 441 and that promptly after the defendant learned of this fact, it tendered to the plaintiffs the sum of $5,228.00 representing the return of premium applicable to said (properties) for that period of time subsequent to January 4, 1973 and denied any and all liability to the Plaintiffs for loss sustained to the said buildings as a result of the fire which occurred therein on May 27, 1973." (Recd. 35.)

Policy Prohibition Against Assignment.

The policy, upon its cover sheet, states:

> "Assignment of this policy shall not be valid except with the written consent of this company." (Recd. 12.)

The Sale.

On January 4, 1973, the Central Manufacturing District (hereinafter referred to as "CMD"), pursuant to the terms of a real estate sale contract, deeded and conveyed an A & P grocery warehouse located at 4404 West District and an A & P grocery garage located at 4330 West 31st Street, to Prudential Insurance Company. The property was destroyed by fire almost six months later, to-wit: on May 27, 1973. An assignment of Royal's policy RKF 63 53 78 had not been delivered to Royal and Royal had not consented thereto.

The Enormity of the Transaction and the Sophistication of the Parties Thereto.

CMD is in the business of purchasing and developing industrial real estate. It sometimes improves and sells the property. On other occasions it leases and manages the property. Income received from these enterprises is for the benefit of CMD shareholders (Recd. 209). In addition to the properties in question, *i.e.*, the A & P grocery warehouse at 4404 West District and the A & P grocery garage at 4330 West 31st Street which were part of the "Crawford Industrial Development", CMD developed and managed industrial districts both throughout the State of Illinois (such as the "St. Charles Industrial Development" and the "Itasca Industrial Development") and properties throughout the nation (Recd. 210-211).

The sale to Prudential involved sixty-nine parcels. The total value of the deal was in excess of $33,000,000.00 (Recd. 211, 284).

The real estate sale agreement of November 22, 1972 was the culmination of negotiations between the representatives of

Prudential and CMD which had extended over a period of ten months (Recd. 211). The transfer of ownership was effected in four separate closings. On each occasion several representatives of both CMD and Prudential, including experienced real estate counsel, were in attendance (Recd. 212).

The Limited Extent of CMD's Undertaking.

Neither the sale agreement nor the management agreement imposed any duty upon CMD to insure or procure property insurance for the properties (Exh. I and Exh. H to Exh. 1).

CMD's only obligation pertained to the assignment of existing policies and there was no obligation set forth in the sale agreement relative to the procurement of consents to those assignments (Recd. 280). CMD was simply asked at the closing of January 4, 1973, wherein title to eighteen parcels, including the two in question, passed "to take care of the details of delivering the assignments of the insurance policies to the proper insurance carriers for approval and acceptance" (Recd. 220). CMD had its own insurance manager who was charged with the responsibility of seeking to obtain the consents of the various insurance companies and of furnishing Prudential notice of acceptance (Recd. 220-221).

The Policy Terms.

In its answer, Royal stated that its policy of insurance was issued "subject to all of its terms, conditions, provisions, requirements and limitations and not otherwise" (Recd. 34). The policy states:

> "This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated which are made a part of this policy. . . ." (Recd. 12, Exh. A to complaint.)

The type of loss for which plaintiffs are provided coverage is stated in the policy to be "Direct Loss by Fire to the property identified in the policy." The policy states:

> "In consideration of the provisions and stipulations herein . . . this company . . . does insure the insured named above (the Trustees of the Central Manufacturing District) . . . to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property . . . nor in any event for more than the interest of the insured, against all DIRECT LOSS BY FIRE . . . to the property described herein. . . ." (Recd. 12.)

The District Court Opinion.

The District Court ruled that acceptance of Respondents' assertions that an insurable interest could be created by the vendor's declaration of liability to the vendee "would serve to deny the insurance company . . . its right to consent to any assignment as provided for expressly in the insurance policy . . ." The Court further ruled:

> "An insurable interest must exist *in the property itself*, or arise from some *direct relationship to the property* sought to be insured."

Rather than "wish away" the consent clause in the standard fire policy as the opinion of the Court of Appeals did, the District Court considered and dismissed Respondents' principal argument on vendor's liability:

> "Plaintiff's brief cites numerous cases standing for the proposition that where a vendor agrees to procure insurance for the property of the vendor and fails to do so, the vendor has an insurable interest in that property. Those cases are distinguishable from the present at least to the extent that in the present case the fire insurance was already procured, and the vendor failed to perform its promise to seek the consent to the assignment of a third party wholly distinct from the parties to the transaction.
>
> "While it is true that an insurable interest is predicated upon the economic benefit of the continuing existence of the property in question, or the economic loss due to the destruction of the property, that statement of the law, stand-

ing by itself, is inapplicable in light of the additional facts presented in this case as well as other rules of law relating to an insurance carrier's right to consent to assignments of its policies."

Supported by strong Illinois law the Court continued:

> "On the face of the policy issued by Royal Indemnity to CMD covering the warehouse and garage is the legend: '"Assignment of this policy shall not be valid except with the written consent of his Company."' Courts have uniformly upheld such express provisions in a fire insurance policy. See *Pfeffer* v. *Farmers State Bank of Schaumburg*, 263 Ill. App. 360, *Klefstad* v. *American Central Ins. Co.*, 207 F. 2d 288 (7th Cir. 1953)."

Noting the attempt of the Respondents to exculpate itself from its own misfeasance at the expense of the Petitioner and the important right to consent, the Court held on page 1080:

> ". . . that where a named insured, under the terms and conditions of a fire insurance policy, transfers by deed pursuant to a real estate agreement all of its right, title, and interest in the property covered by the insurance policy to a transferee, and immediately thereafter undertakes to procure a consent from the insurer to an assignment of its rights under the policy to the transferee, and then fails to perform that undertaking, the named insured will be deemed to have lost any insurable interest in the property covered by the insurance policy as of the time of delivery of the deed. *A rule of law, such as that proposed by the plaintiff, which would create an insurable interest in the transferor by virtue of his liability to the transferee for failure to perform his undertaking to procure an insurance company's consent to an assignment would serve to deny the insurance company of its right to consent to any assignment as provided for expressly in the insurance policy, and would serve to exculpate the transferor from liability for its own misfeasance or breach of contract with the transferee at the expense of the insurance company.* (Emphasis added.)

In concluding, the Court stated on page 1081:

> "In light of the express provision for the written consent of the insurance company to any assignment of rights under a policy, and in light of the insured's total failure to perform its promise to seek the insurance company's consent to the assignment, the supposed liability of CMD to Prudential is not tantamount to the creation of an insurable interest in CMD. *An insurable interest must exist in the property itself, or arise from some direct relationship to the property sought to be insured. The interest cannot arise from facts wholly extraneous to and separate from the destroyed property*—an insurable interest in CMD in the destroyed property cannot arise by virtue of CMD's own misfeasance in performing its undertaking to procure Royal Indemnity's consent to the assignment of CMD's rights under the policy to Prudential."

ARGUMENT.

I.

RESPONDENTS' CONVEYANCE OF PROPERTIES DIVESTED ANY INTEREST PROTECTED BY THE POLICY OF INSURANCE. THE COURT OF APPEALS' REFUSAL TO BE BOUND BY ILLINOIS LAW IS VIOLATIVE OF THAT PRINCIPLE FOUNDED IN CONSTITUTIONAL SAFEGUARDS THAT, FOR PURPOSES OF DIVERSITY JURISDICTION, A FEDERAL COURT IS IN EFFECT ONLY ANOTHER COURT OF THE STATE.

A. Preliminary—Proper Focus.

There has been a serious mistake. Although the question of insurance law here presented may appear complex, it is nonetheless totally clear. Petitioner respectfully submits that the Court of Appeals misunderstood the issues presented and has thereby rescued CMD and Prudential from there astonishingly careless actions to the detriment of Petitioner and at the expense of distorting one of the most basic concepts of insurance law, *insurable interest*. It is upon this concept that the Court of Appeals reversed the well reasoned opinion of the District Court and transformed a fire insurance policy, a property policy, into an errors and omissions policy, a liability policy. It appears that the Court of Appeals was so overwhelmed by the so-called equities for the Respondents that it was dissuaded from accepting and applying Illinois law.

This case is clearly an instance of a growing jurisprudential conflict between the federal and state Court systems. It again appears as it did prior to the Supreme Court ruling in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1937) that in diversity cases there are two separate systems of justice—that of state law as established by the state Court—

and that created by the federal Court's application of those notions of justice more consonant with that Court's predilections.

This case must be placed in proper perspective. Petitioner has no obligations beyond those contractually assumed and the fact is that Petitioner simply did not agree to afford coverage for the claimed loss. The policy insures against "Direct Loss by Fire . . . to the property described". The building damage was not a direct loss to CMD. Its loss, if any, flowed from its negligence to advise Prudential of the failure to obtain consent. Incredibly—in view of CMD's vast size and financial holdings and the sophistication of its personnel as described in their depositions and as evident in the legal draftsmanship of the purchase and sale agreement of November 22, 1972—the loss was self-inflicted.

The insurance industry, an important part of both the state and national economy, will not, and cannot be afforded less than the rights of other citizens. Insurance contracts must be construed as written and not according to Court preference.

The policy plainly provides that assignment of the policy "shall not be valid except with the written consent of Royal". The provision is valid. Moreover, it means what it says. *Pfeffer* v. *Farmers State Bank of Schaumburg*, 263 Ill. App. 360. That the point is beyond dispute was noted by the *Pfeffer* Court at 263 Ill. App. 370:

> "No one of (the authorities cited) holds and (we doubt whether a case can be found in the books holding) that in a case like this an insurance company would be bound unless it gave consent to the assignment. This policy expressly provides that the insurance company shall not be bound without its consent." (First parenthetical statement supplied.)

Consent is essential because, as further noted in *Pfeffer*, the parties thereby create a "new and valid contract". No insurer may properly consent to assignment of a policy to a new owner

after the property has been damaged or destroyed by a covered peril any more than an insurer could retroactively write a new policy for such owner after loss. The element of risk of loss, essential to the validity of insurance, would be non-existent.

The concept of insurable interest, *i.e.*, the derivation of pecuniary benefit from the existence of a building or financial loss by reason of its damage, cannot be viewed in a vacuum. Both the terms of the contract and common sense must be taken into account. The interest must be in the property itself so that, as clearly stated in the policy, the loss is a direct loss from the destruction of that property. The loss claimed by CMD was remote, indirect and consequential—the result of negligence.

Absent that negligence, the loss of the building was nothing to CMD.

The need for a direct connection between the subject matter of the insurance and the party on whose behalf the insurance was effected was recognized long ago in *Lucena* v. *Craufurd*, 2 B. & P. N. R. 269, 324, 127 Eng. Rep. 630, 651 (1805):

> ". . .(I)f moral certainty (or expectation) be a ground of insurable interest, there are hundreds, perhaps thousands, who would be entitled to insure. First the dock company, then the dock master, then the warehousekeeper, then the porter, then every other person who to a moral certainty would have anything to do with the property, and of course get something by it."

The alternative to this common sense approach is chaos. We are dealing with property, not liability, insurance. It is common practice for insurance agents and brokers to carry errors and omissions insurance to cover exposure to legal liability arising out of their work on behalf of their customers but obviously they do not carry property insurance upon the property of their customers. They clearly have no insurable interest in such property even though under certain circumstances they may incur liability to the property owner as a consequence of the destruction of the property. Similarly, physicians and

surgeons carry a form of liability insurance known as malpractice insurance. Obviously they do not carry accident and health and life insurance policies upon their patients. Clearly they do not have an insurable interest in the lives of such patients. The same may be said with respect to lawyers who carry professional liability insurance covering their own potential liability to their clients. They do not carry insurance in their names upon the property of their clients.

The Court of Appeals' brusque treatment of the District Court's Memorandum of Decision *published* as *Prince* v. *Royal Indemnity Company*, 404 F. Supp. 1076 (1975), as an "unpublished memorandum" is unfounded. Indeed, rather than "no authority in Illinois law" supporting the District Court's view, as stated by the Court of Appeals, there is absolutely no Illinois law in support of the position adopted by the Court "by analogy" in an effort to circumvent the consent clause in the standard fire policy long recognized and upheld by Illinois authority and twist and turn the concept of insurable interest at its whim to convert a property insurance policy into an errors and omission policy.

B. The Court of Appeals' "Distinction" of the Illinois Rule on Insurable Interest Is Illusory; That Court Simply Substituted Its Own Opinion for Illinois Law Which Here Required That Judgment Be Entered in Favor of Petitioner.

Petitioner has no quarrel with the general rule that one has an insurable interest in property who derives a pecuniary or real benefit from its existence, or who would suffer financial loss by reason of its damage or destruction; Petitioner emphasizes that this interest must be *in the property itself;* that is, an *interest in the property*, which interest is of continuing pecuniary value to the person by reason of the existence of the property and which will be directly lost by the destruction of the property. Respondents are asserting an interest not in the property,

which would support an insurable interest necessary to the validity of a property insurance policy, but rather an alleged exposure to personal liability arising out of negligence wholly unrelated to the property itself, which conceivably would be sufficient to support an insurable interest under a policy of liability insurance.

Petitioner respectfully submits that the opinion of the Court of Appeals is incorrect—that it is inconsistent with Illinois decisions which have been based upon the question here presented. The applicable Illinois law is not open to construction.

In our opinion, if this matter was presented before the Illinois Supreme Court the view of the District Court would readily prevail.

The concept of insurable interest cannot be viewed in a vacuum. The interest must be *in the property itself;* as clearly stated in the policy, the loss must be a *direct* loss from the destruction of the property by the peril insured.

The fundamental principle here controlling was set forth by the Illinois Supreme Court in *Illinois Mutual Fire Insurance Co.* v. *Andes Insurance Co.*, 67 Ill. 362, 363 (1873):

> ". . . if the assured has parted with all his interest in the subject insured before the loss happens, he cannot recover, for the reason that the contract is regarded as one for indemnity, and he has sustained no loss or damage."

In accord with both the contract provisions and the nature of the policy, Illinois has consistently required such a relationship to the property that a happening adversely affecting the property be of direct economic disadvantage to the plaintiff. The loss protected is loss "by the destruction of the property". *Lieberman* v. *Hartford Fire Insurance Co.*, 6 Ill. App. 3d 948, 287 N. E. 2d 38 (1972).

The position of Illinois was set forth with unmistakable clarity in *Patterson* v. *Durand Farmers Mutual Fire Insurance Co.*, 303 Ill. App. 128, 24 N. E. 2d 740 (1940). The effect

of *Patterson* is that the tendency of modern decisions to relaxation of the stringency of earlier cases must not be misconstrued to permit the alteration of the very nature of the contract. The requisite relationship to the property must be present. There must be a "fixed, cognizable estate or interest in the property" so that loss of the property is a "direct pecuniary loss to plaintiff". The Court further stated:

> "This insurance policy did not insure the dwelling which was destroyed by the fire, but insured appellee against *all direct pecuniary loss* which she might suffer *by reason of its destruction.*
>
> * * *
>
> "An insurable interest at the time of the issuance of a policy of insurance and at the time of the loss are essential to the validity of an insurance policy . . . and the Courts hold that where the insured has no insurable interest, as policy issued to such person is void as against public policy.
> ". . . (the officers of the defendant) had no lawful right to pay out the funds of their mutual company in satisfaction of a claim for a loss to a person who had no insurable interest in the property destroyed."

Stated another way, the damage to or destruction of the premises must *ipso facto* be a loss to Respondents. As noted in *Home Insurance Co.* v. *Mendenhall*, 164 Ill. 458, 45 N. E. 1078 (1897) upon which the Court of Appeals relied, although an interest to be insurable need not be an "existing *jus in re nor jus ad rem,*" there must be "such a relation to the property" that the destruction of the property "by the peril insured against involves pecuniary loss" to the claimant. Illinois has never deviated from this requirement of a fixed, cognizable estate or interest *in the property* which cannot be divested.

In *Mendenhall*, plaintiff whose father had purchased the property at a partition sale, had such a vested interest. He was in possession and control of the property and further his interest was certain to ripen into absolute title upon the issuance of the deed. The Court stated at 164 Ill. 463:

> ". . . he (plaintiff) hold(s) such a relation to the property that its destruction by the peril insured against involves pecuniary loss to him . . .
>
> "His title it is true at the time was one in expectancy, but under certain conditions was sure to ripen into one absolute. Where the title of one is such, though not in fee, that he would suffer a loss or damage *by the destruction of the premises*, he may protect his interest, whatever may be the nature of it, by insurance, and thus it follows that an insurable interest is not always a fee simple title." (Emphasis supplied.)

This is the point of focus—the common thread running through the Illinois decisions. The relationship to the property must be such that loss is suffered *by the destruction of that property*. The Court of Appeals' "distinction" of *Mendenhall* is no more than a contrived device designed to contravene the Illinois rule.

In *Griffin* v. *Pfeffer Lumber Co.*, 285 Ill. 19, 120 N. E. 583 (1918) the insurable interest was that of a lessee in possession. In *Fray* v. *National Fire Insurance Co.*, 341 Ill. 431, 173 N. E. 479 (1930), plaintiff was a trustee with "a legal interest in the property" enabling him to "insure it as his own and in his own name". In *Home Insurance Co.* v. *Peoria, P. U. Ry. Co.*, 78 Ill. App. 137 (1889), the insured was in the same position as a warehouseman or custodian who has a personal interest in the property. The plaintiff in *Danvers Mutual Fire Insurance Co.* v. *Schertz*, 95 Ill. App. 656 (1900) had, upon his purchase of the property, conveyed the same to his wife for convenience, but remained in possession, received the profits, and claimed absolute ownership. In *Downs* v. *Michigan Commercial Insurance Co.*, 157 Ill. App. 32 (1910) and *Capps* v. *National Union Fire Insurance Co.*, 318 Ill. 350, 149 N. E. 247 (1925) plaintiff was the purchaser of the property and was in possession under a bond for deed. Plaintiff in *Welch* v. *Northern Assurance Co.*, 223 Ill. App. 77 (1921) was the majority shareholder of the corporation which was in possession of and owned

the building. Additionally, plaintiff held title and was guarantor of the corporation's indebtedness. The insurable interest in *Whelan* v. *Massachusetts Bonding & Insurance Co.*, 205 Ill. App. 122 (1917), *pet. lv. app. den.* was the right of plaintiff, the pastor of a church, the title of which was in the Catholic bishop, to use and enjoy the premises. This was such a "relation to the property" that destruction of the property was in itself a pecuniary loss to him. The right was, as noted by the Court "a sufficient property right to constitute ownership".

Illinois law is capsulized by *Agricultural Insurance Co.* v. *Clancey*, 9 Ill. App. 137 (1881) wherein the property secured a mortgage for which claimant was responsible and additionally the claimant was a trustee for the mortgagee. The essential element is that the interest, to be insurable, must be *in the property itself*. The Court noted that although it was not necessary that there be a present property right *per se*, there must be "such a connection . . . between the subject matter . . . and the party in whose behalf the insurance has been effected" that there is "loss to him from the occurrence of an injury to it."

CMD had no interest in the property. The loss was solely the result of CMD's exposure to personal liability as the result of CMD's negligence.

In supporting its contention of an insurable interest on page 6 of its opinion, the Court quotes 3 *Couch on Insurance* 2d Sec. 24:13. An examination of this section supports the Petitioner's contention:

> . . . The right of interest must be such as the law will recognize and protect, that is, of such a character that the destruction of the property will have a direct, and not a mere remote or consequential, effect upon it. The interest must be direct and immediate, as distinguished from remote and consequential, and it should not be based on a bare possibility.

While referring to the broad language contained in *Couch on Insurance* Sec. 24.13, the Court of Appeals failed to consider the

more particular language contained in *Couch on Insurance* Sec. 24:100 and Sec. 24:101 as well as 4 *Appleman, Insurance Law and Practice* Sec. 2241, 22 *Illinois Law and Practice: Insurance* Sec. 307 and the Illinois Cases contained therein:

COUCH ON INSURANCE, § 24:100 and § 24:101.

§ 24:100. Vendor and purchaser—Vendor under contract to sell.

"A vendor, or one who has contracted to convey to another either real or personal property, and who retains the legal title until the conditions are performed which will entitle the purchaser to a conveyance, retains title as security and has an insurable interest in the property to the time the conveyance is made, when the interest ceases.

§ 24:101. Vendor after delivery of deed or transfer of title.

"After a vendor has absolutely parted with all ownership, title, and interest in the property sold, so that all risk of loss rests on the vendee and no injury will result to the vendor from the destruction of the property, the vendor has no insurable interest therein."

4. APPLEMAN, INSURANCE LAW AND PRACTICE.

"*§ 2241. Transfer of Interest or Sale of Property.*

* * * * *

"A fire contract, or other property insurance, is considered a personal contract in that the hazards which the company elects to assume are hazards concerned with the contracting individual—his care, moral qualities, and the like—the insurance running to the individual rather than upon the property. If the insured, then, parts with all interest in the property prior to loss, it is not covered. It is not necessary to have a specific by-law to the effect that a transfer or sale of the property avoids protection; a sale by the insured between the date of the policy and the date of loss is considered to avoid protection."

22 ILLINOIS LAW AND PRACTICE, INSURANCE, § 307.

"It has been held that an insured cannot recover under a fire policy unless he has an interest in the property at the

time of the loss, and that an absolute alienation works a forfeiture, whether or not so stipulated in the policy, if ownership of the property remains out of the insured at the time of the loss."

The foregoing rule of law, followed and applied by the Illinois courts, similarly obtains in other jurisdictions. In *Estes* v. *Great American Ins. Co.*, 112 S. W. 2d 153 (1938), the Missouri Court of Appeals held that a fire insurance contract is an indemnity contract; that the insured must have an insurable interest, both at the inception of the risk and at the time of loss; and that persons who are not parties to the contract could not recover thereunder.

In *Shadid* v. *American Druggist Fire Ins. Co.* (Okla.), 386 P. 2d 311 (1963), the Supreme Court of Oklahoma found that the insured under a fire policy conveyed all of her title and interest in a drug store, and no longer had an insurable interest. Similarly, in *Pressly* v. *America*, 14 N. C. App. 561, 188 S. E. 2d 734 (1972), the Court held that there at the time of the fire the named insured in a fire policy did not hold record title to the dwelling described in the policy, and the record titleholder was not named in the policy, neither the named insureds nor the record titleholder were entitled to recover the proceeds of the policy. See also *Wriedt* v. *Beckenhauer*, 183 Neb. 311, 159 N. W. 2d 822 (1968); *Marcuse* v. *Upton*, 9 La. App. 28, 118 So. 790 (1928).

In *Pappas* v. *Insurance Co. of State of Pa.*, 54 Tenn. App. 640, 393 S. W. 2d 298 (1965), a father transferred property to his six year old son. The transfer was motivated by his fear that his wife would dissipate his estate. The father had insurance on the property but did not transfer the insurance policy to his son. The Court said:

"In the case at bar Dr. Pappas on his own volition, transferred this property to his minor son without advising the insurance companies. There seems to be little doubt he knew the transfer of his property divested him of his interest for one of the reasons he gave for making the

transfer was to put the property beyond the reach of his wife. As we see it, his only rights now in the property would be the possibility of inheritance, under certain circumstances provided he survives his son. We cannot say this mere possibility would be one from which he would derive a pecuniary benefit or advantage from the property's preservation neither can we say the destruction of the property would be a loss to Dr. Pappas. The burning of the house was undoubtedly a loss to the one who may be affectionately concerned about his son's property, we do not see that he has any loss by the destruction of the property which would be insurable in his own name."

In *Lumberman's Mutual Insurance Company* v. *Edmister*, 412 F. 2d 351 (8th Cir., 1969), the insured transferred his legal title to the premises. The Court rejected the insured's claim of insurable interest, notwithstanding the following facts:

(a) The insured was in possession and actually occupying the premises;

(b) The insured was using the premises as a headquarters for tax service, farming and an anticipated housing development venture;

(c) The insured purchased labor and materials for the house; and

(d) The insured had an inforcible vendor's lien worth at least $200.00 against the dwelling.

Clearly, the insured in that case had a more direct relationship with the insured premises than did CMD in the present case. *This case is in direct conflict with the opinion of the Seventh Circuit Court of Appeals in the instant case.*

It is respectfully submitted that under the foregoing authorities and applicable rules stated herein, it is clear that the Respondents had no insurable interest in the property on the date of loss. Respondents had no legal or equitable interest in the premises, nor did they have an interest that could have been insured in their own names. Since the terms of their conveyance

did not preserve an insurable interest, they now may not rely on their gratuitous promises to obtain the consent of the Petitioner to the assignment of the policy as creating an alleged insurable interest.

C. Respondents Did Not Sustain the Required "Direct" Pecuniary Loss. The Indemnity Which Respondents Sought for Indirect Loss Is Afforded Only by "Errors and Omissions" Coverage; It Is Not Afforded Under the Policy of Property Insurance.

To constitute an insurable interest in property, the law is clear that such interest must be one which the law will recognize and protect. It must be of such a character that the destruction of the property will have a *direct* and not a mere *remote, or consequential,* effect upon it. On Page 7 of its opinion (A-8), the Court of Appeals rejected without authority, Petitioner's contention that the Respondents' loss was an indirect loss.

CMD sustained no *direct* loss by fire. That loss was sustained by Prudential, the sole and unconditional owner of the property on the date of the fire. The loss of CMD was the remote, indirect and wholly consequential result of the fire. It was caused, not by the fire, but by negligence, *i.e.,* the failure of CMD to seek Royal's consent to a new contractual relationship and CMD's failure to properly advise Prudential of its success or failure in this regard.

The policy plainly states:

". . . this company . . . does insure the insured named above . . . against all DIRECT LOSS BY FIRE . . . to the property described herein. . . ."

The contract is the law between the parties. Clear and unambiguous terms such as the requirement that loss by a "Direct Loss" must be given effect in accord with their plain, ordinary and popular meaning. As was noted by Judge Cardozo in *Bird* v. *St. Paul Fire & Marine Insurance Co.*, 224 N. Y. 47,

120 N. E. 86 (1918), loss which is not direct, but which is indirect or consequential, such as that brought about by an intervening proximate cause, is simply not within the purview of coverage.

Additionally, the requirement that loss be direct is fundamental to the very nature of the policy. The policy was not liability insurance which would indemnify the insured "against loss from his own negligence . . ." *Couch on Insurance* 2d, Sect. 44:2; *Principles of Insurance,* Mehr and Cammack, p. 373. Rather this is property insurance and the hazard therein contemplated is damage or the destruction of the insured's property. *City of Nokomis* v. *Smith,* 74 Ill. App. 2d 211, 219 N. E. 2d 776 (1966). The distinction was made in *General Insurance,* Magee, 4th Edition at page 333:

> "In contrast to direct damage insurance, which indemnifies the insured when loss is the outgrowth of injury to his own person or property, liability insurance policies do not cover loss or damage to the person or property of the insured, but cover instead the liability for damages imposed by law."

It is axiomatic that indirect loss is not compensable under a policy of property insurance. The fact of loss, standing alone—irrespective of the reality or enormity thereof, is immaterial. For coverage to be afforded, the loss must be the direct result of fire.

In *In Re Reynolds Estate,* 94 Vt. 149, 105 A. 60 (1920), the plaintiff holders of a mortgage upon premises owned by the insured and adjacent to the premises upon which the insured building burned, were held, despite the economic detriment suffered in consequence of the loss of the property, to have no insurable interest in the property destroyed. The Court stated at 109 A. 63:

> ". . . while great liberality is indulged in in determining the question whether one has anything *at hazard in the subject matter* of the insurance, he must have such a right or interest therein as the law will recognize and protect. This must be of such a character that the destruction of the property will have a direct effect upon it and not a remote

> or consequential effect upon it. *Merrett* v. *Farmers Insurance Co.,* 42 Iowa 11. Since the $500.00 mortgage did not cover the buildings, the holders thereof had only an indirect and remote interest therein." Accord: 4 *Appleman,* Insurance Law and Practice, Sec. 2123, p. 40 (1941); *Couch on Insurance* 2d, Sec. 24:13 (1960); 29 *Am. Jur., Insurance,* Sec. 439.

Respondents' attempt to find a basis for recovery in any uncertainty which might be of economic disadvantage to Respondents is utterly unfounded. The requirement that loss be *Direct* is absolute.

Contrary to the interpretation of the Court of Appeals, the purported loss of Respondents is a remote, indirect and wholly consequential result of the fire. If in fact, liability to Prudential exists at all, it was caused *not* by the fire but by the self asserted negligence of the Respondents in not procuring the consent of the Petitioner to the assignment of all right, title and interest in and to the policy to Prudential following its sale of the property to Prudential. The Respondents sought and were rewarded by the Court of Appeals a self proclaimed liability under a property insurance policy. The Respondents' case is the collusive effort by the Respondents and Prudential in nullifying the right of the Petitioner to grant or withhold its written consent to an assignment of its policy.

The Court of Appeals could not rule that the Respondents suffered a *direct* financial loss because of the occurrence of a peril insured against in the standard fire policy in question. The policy covered the risk of fire, not negligence. Respondents had nothing to lose by the destruction of Prudential's properties and its action did not cause the properties to be destroyed by fire. If the Prudential had been named as an insured in the policy by assignment with the consent of the Petitioner prior to the loss, Respondents would have suffered no loss and received nothing. The requirement that the loss be *direct* is absolute.

The opinion by the Court of Appeals foists an additional risk upon the insurer other than risk of destruction by fire. The

Court of Appeals has ordered the Petitioner to indemnify an unbargained for risk—the risk that the insureds would be negligent in gratuitously agreeing to obtain consent to assignment of the policy. Neither party could possibly have contemplated the existence of coverage to include a risk of such liability of CMD to Prudential as the entire transaction involved an amount well in excess of $30,000,000.00.

An essential flaw in opinion of the Court of Appeals is its equation of an agreement of a vendor or broker to have the assignment of the policy consented to by the company with an agreement of a vendor or broker to insure or cause to be insured. The essential difference, as noted by the District Court, is that the agreement of a vendor or broker to obtain company consent to an assignment of the policy requires more than an action by the vendor or broker. It requires the consent of a third party; namely, the insurance company, as to which and over which the vendor or broker has no control.

As the District Court observed, all of the case law cited by the Respondents deals with damages for failure to fulfill an agreement to procure insurance. The instant case is distinguishable in that the Respondents recognized the validity of the consent provision in the insurer's contract and made a gratuitous promise to obtain the consent of the Petitioner to the assignment of the policy to a third party. The contractual right of the company to consent to an assignment of its policy to a new owner of the property described in the policy before the occurrence of the destruction of the property, has been effectively and totally abrogated and denied by the Court of Appeals.

The contractual right of the Petitioner to consent to assignment of its policy to a new owner of the property described in the policy, before the occurrence of the destruction of the property by a peril insured against in the policy, is a very real and necessarily vital one, and, as such, is one that the Petitioner is not only justified in preserving but is required to preserve.

The practical effect of the opinion of the Court of Appeals is to wholly obliterate and nullify that important and essential contractual right of consent of the Petitioner, as to which and over which neither CMD nor Prudential had or has control. This involves a fundamental constitutional right of lawful contract and its destruction, as is herein sought to be accomplished by CMD, should not be countenanced.

In *Pfeffer* v. *Farmers State Bank of Schaumburg*, 263 Ill. App. 360 (1931), the Court said:

> "Defendant next contends that the consent of the insurance company to the assignment of the insurance contract was not necessary in order to protect plaintiff's interest. This contention is based on the well known rule that a contract of insurance is construed most strongly in favor of the insured. Defendant cites *Endelman* v. *American Ins. Co.*, 297 Ill. 222; *American Smelting & Refining Co.* v. *Funker Hill & Sullivan Min. & Con. Co.*, 248 Fed. 172, with many other cases. It is, we think, wholly unnecessary to review these (the Defendant's) cases. Not one of them holds (and we doubt whether a case can be found in the books holding) that in a case like this an insurance company would be bound unless it gave consent to the assignment. This policy expressly provides that the insurance company shall not be bound without its consent."

The same rule was applied in a case by the same Court of Appeals for the Seventh Circuit in *Klefstad* v. *American Central Ins. Co.*, 207 F. 2d 288 (1953). The Court stated at page 289:

> "Neither do we need to set forth or discuss the numerous legal grounds upon which defendants rely in support of the judgment. This is so for the reason that plaintiff, irrespective of all other considerations, is not, in our judgment, entitled to maintain the instant suit because he was not named as an insured and, so far as we are aware, the contracts contain nothing which indicates they were made for his benefit or protection. In fact, he was total stranger to the insurance policies issued by the defendant companies to the Major company, in which the latter was the sole

> insured or beneficiary. Reference to a few of the numerous Illinois cases leaves no room for doubt but that such is the rule and that this is an appropriate case for its application."

The basic rule which affirms that no assignment of the policy is valid without the consent of the company is the obvious reason that CMD and Prudential have elected to take the extreme action of "recission" of the sale and institute suit upon the policy in the name of CMD. It is this effort on their part to circumvent this basic rule of law which forms the essence of the case. What they are seeking to do is convert a property insurance policy into a policy of liability insurance.

The Court of Appeals' opinion has relieved the negligence and carelessness of two highly experienced and large property owners, CMD and Prudential from the necessity of obtaining the written consent of the insuring company prior to loss of an assignment of property insurance upon property which was the subject of sale to a new owner. The Court of Appeals, despite the evident sophistication of Prudential, CMD and their attorneys and representatives, has cast aside the usual consequences of the failure of these parties to abide by the basic legal aspects of the purchase and sale of real estate. Cast aside is the duty on the purchaser to make arrangements under which the insurer either consents in advance to an assignment of the policy from the seller to the purchaser to be effective upon the conveyance of title to the property from the seller to the purchaser or to make arrangements with an insurer to provide interim coverage upon the property for the interim period.

The oral, apparently casual, request at the fourth closing, that CMD "take care" of seeking Petitioner's consent to the assignment of its policy to Prudential was the sole basis upon which CMD's liability was predicated. Simply stated, CMD had undertaken a responsibility and, as any volunteer, was bound to discharge that undertaking in a careful manner. CMD was obligated to seek Petitioner's consent within a reasonable time and to, again within a reasonable time advise Prudential of Petitioner's decision.

It is apparent that the Respondents did not notify the Prudential that the consent had been obtained. Surely the principal, The Prudential Insurance Company, had a duty to inquire whether the consent had, in fact, been obtained. For a period of almost six months Prudential never received any assurance that the insurer's consent had been obtained by its purported agent, and made no effort whatsoever to determine whether it had, in fact, been obtained.

The Court of Appeals' decision had blessed Respondents' efforts at submitting a liability claim to a property insurer and with a twisted reading of liability case on Page 7 (A-8) of its opinion has denied this property insurer two important rights afforded to liability carriers; (1) the right to defend, and (2) the right to interpose an affirmative defense of contributory negligence.

The Court of Appeals has condoned the determination of alleged liability and the extent of alleged liability by the Respondents without the advice or participation of the insurer. Respondents' extreme action in "acknowledging" liability and its success in foisting this liability on its fire insurance carrier is without precedent by any authority in any state.

Each case cited on page 7 of the Court of Appeal's decision (A-8) involves situations wherein a liability insurer unjustifiably refused to defend a covered claim against its insured, which unjustified refusal operated as a waiver of policy conditions and permitted the insured to make reasonable compromise of its liability, and on such reasonable settlement of claim, the liability of the insurer became fixed and liquidated.

This unfounded analogy to principles of liability insurance law, has no application to the present property damage claim and strongly supports Petitioner's position that the opinion of the Court of Appeals has erroneously transformed a property insurance policy into a liability insurance policy.

II.

THE REFUSAL TO ACCEPT THE BINDING PRINCIPLES OF ILLINOIS LAW IS AN UNCONSTITUTIONAL ABROGATION OF THE REQUIREMENT THAT IN DIVERSITY CASES STATE LAW CONTROLS.

A federal Court is, for purposes of diversity jurisdiction, to be considered simply another Court of the state. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 2d 1188 (1937). Derogation of this rule has practical implications relative to the proper administration of justice in federal Courts. The United States Constitution reserves the autonomy and independence of the states—an independence which extends to the judiciary. Any interference therewith except as permitted by the Constitution, is an invasion of the state and to that extent a denial of its independence. *Fidelity Union Trust Company* v. *Field,* 311 U. S. 169, 85 L. Ed. 2d 109, 61 S. Ct. 176 (1940).

The opinion of the Court of Appeals speaks for itself. It is readily apparent that the Court considered the applicable state law "regressive". This aversion is no justification for rejection of state law as prescribed by the state's highest Court. State law must be followed "however superior (a different rule) may appear from the view point of general law". *West* v. *American Telephone and Telegraph Company,* 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 2d 139, 144 (1940).

The purpose of Section 34 of the Judiciary Act (Title 28, Section 1652, U. S. C.) is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state Courts, the other to be availed of in federal Courts in cases of diversity of citizenship. The Court of Appeals' decision constitutes both an unreasonable and unlawful discrimination against those subject to federal jurisdiction and an abrogation of the right of property in violation of the guarantee of due process under the Fifth Amendment to the United States Constitution. The unfairness of refusing to treat all litigants

equally because of the fortuitous circumstances of diversity is compounded by the destruction of petitioner's contractual rights without due process of law. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 2d 1188 (1937); *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2d 2079 (1945); *Home Insurance Co.* v. *Dick,* 281 U. S. 397, 50 S. Ct. 338, 74 L. Ed. 2d 926 (1929); *Hartford Accident & Indemnity Co.* v. *Della & Fine Land Co.,* 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 2d 1178 (1933).

The ruling here constitutes *both* an unreasonable and unlawful discrimination *and* an abrogation of the right of property in violation of the guarantees of due process under the Fifth Amendment to the United States Constitution.[2] The insurer here was unconstitutionally discriminated against under a dichotomy not recognized by state law by a deprivation of a defense to which it would have been entitled had the litigation not been instituted in the federal Court. Additionally, the unfairness of refusing to treat all litigants equally because of the fortuitous circumstances of diversity is compounded by the destruction of petitioner's contractual rights without due process of law. This creates the very dichotomy and unconstitutional discrimination condemned by this Court in *Woods* v. *Interstate Realty Co., supra,* wherein this Court stated at 93 L. Ed. 2d 1527:

> " . . . a right which local law creates but which it does not supply with a remedy is not right at all for purposes of enforcement in a federal court in diversity cases . . . where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court. The contrary result would create discriminations against citizens of the state in favor of those authorized to invoke the diversity jurisdiction of the federal court."

2. While the Fifth Amendment to the United States Constitution does not contain an explicit safeguard of an equal protection clause such protection is generally derived from the "due process" clause of the amendment. *Bolling* v. *Sharpe,* 1954, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 2d 884.

CONCLUSION.

Petitioner insured only the risk of destruction of property by fire. Respondents have succeeded in foisting an additional, unbargained-for risk upon Petitioner—the risk that Respondents would be negligent in obtaining its consent to assignment of the policy. Respondents sought coverage for nothing other than a liability claim—a risk for which a fire insurer provides no protection—and in doing so are denying the Petitioner those important rights which are afforded the liability carriers, *i.e.*, the right to defend and the right to interpose an affirmative defense of contributory negligence. Moreover, Respondents by their claim, have attempted to vitiate Petitioner's right to consent or withhold its consent to assignment of the policy.

The point controlling is that Respondents did not suffer a direct financial loss because of the occurrence of the peril insured against in the standard fire policy. The policy covered only the risk of fire and CMD, other than for its negligence, had nothing to lose by the destruction of Prudential's property. CMD was completely out of the picture when the fire occurred.

The fallacy of CMD's argument is demonstrated by assuming that Prudential had been named as an insured in the policy by Petitioner's consent to assignment prior to loss. It is obvious that in such circumstances Prudential would have recovered under the policy and plaintiffs, having suffered no loss, would have received nothing. Respondents' interest with Prudential out of the picture are no different. The assertion by Respondents is entirely unprecedented. The controlling principle was stated in *Marcuse* v. *Upton*, 9 La. App. 28, 118 So. 790 (1928):

> "(It is) the fundamental law of fire insurance which is a contract, not of speculation, but of indemnity alone, (that) a party insured loses all title or interest in a policy the instant he parts with ownership or interest in the thing insured and has no longer any interest in the policy susceptible of assignment by him."

Based upon a reading of the Court of Appeals' opinion, one may pose the question, of what the Court of Appeals would rule *if* the Trustees of this huge Massachusetts Trust, known as the Central Manufacturing District, had in fact carried liability insurance (as one might expect of them); *i.e.*, errors and omissions insurance. Would the Court of Appeals exculpate the errors and omissions insurer; *i.e.*, the liability insurer, and shift its possible liability to the Trustees' former property insurance carrier? It is certain that they would not. Here the Trustees chose not to incur the premium expense of errors and omissions insurance, but rather chose to be self insurers of such liability exposure, and in effect pay to themselves the premium incident to such liability coverage. It is submitted that this presumably informed election on the part of the Respondents should not constitute justification for shifting responsibility to this property insurance carrier.

The rejection by the Court of Appeals of Illinois law has singled out and discriminated against Petitioner as contrasted with those litigants not subject to federal jurisdiction and has unconstitutionally deprived Petitioner of a viable defense upon which it would have prevailed in the state Courts.

Thus, for the reasons above stated and upon the authorities cited, Petitioner respectfully prays that this Honorable Court grant its writ of certiorari to the United States Court of Appeals for the Seventh Circuit and that upon review the decision rendered below be reversed with directions that judgment be entered for Petitioner.

Respectfully submitted,

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APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 76-1061

W. WOOD PRINCE and JAMES F. DONOVAN, as Trustees of the CENTRAL MANUFACTURING DISTRICT,
Plaintiffs-Appellants,

v.

ROYAL INDEMNITY COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division—No. 73 C 3195
WILLIAM J. LYNCH, *Judge.*

ARGUED JUNE 8, 1976—DECIDED SEPTEMBER 2, 1976

Before CUMMINGS, TONE and WOOD, *Circuit Judges.*

TONE, *Circuit Judge.* This is a diversity action on a fire insurance policy containing the usual provision that assignment of the policy requires the insurer's consent. The issue is whether under Illinois law the insured had an insurable interest which entitled him to recover for a fire loss after selling the insured property, assigning the policy, and undertaking to forward the

assignment to the insurer for acceptance but failing to do so. When the buildings covered by the policy burned and the seller-insured filed a proof of claim, the insurer, not having received the assignment or consented to it before the fire, denied liability on the ground that the sale terminated the seller's insurable interest. The District Court sustained this position. We reach the opposite result.

The case was submitted to the District Court for decision on the following stipulated facts: Plaintiffs are the trustees of Central Manufacturing District (CMD), which is engaged in developing and managing industrial real estate. CMD is the named insured under a fire insurance policy issued by defendant Royal Indemnity Company which covered, among other buildings, a warehouse and garage leased by CMD to A & P Company. Royal had been the insurer of the A & P-leased property since 1966. In 1972 CMD agreed to sell 69 parcels of real estate, including the A & P-leased property, to the Prudential Insurance Company of America. As a part of this transaction it was agreed that CMD would continue to manage the properties transferred. Transfer of ownership was effected in four separate closings. At the fourth closing, on January 4, 1973, title to the A & P-leased property and 16 other parcels was transferred.

Among the documents tendered by CMD to Prudential at each closing were executed assignments of fire insurance policies covering structures on the transferred parcels. At Prudential's request, CMD agreed to forward these assignments to the various insurers to obtain their approvals of the assignments.

CMD neglected to deliver the assignment of the policy covering the A & P-leased property to defendant for acceptance. On May 27, 1973, a fire destroyed the warehouse and damaged the garage, causing a loss which it is agreed amounted to $2,415,729. CMD filed a proof of loss. Defendant denied liability on the ground that CMD's insurable interest terminated when the property was transferred to Prudential.

Some six months after the fire, Prudential transferred the A & P property back to CMD and CMD returned the purchase price pursuant to an agreement which recited that it was made "in lieu of determining the amount of damages for which the Trustees are liable to Prudential on account of the fault or neglect of the Trustees . . ."

Plaintiffs argue that CMD had an insurable interest in the property by virtue of (1) CMD's liability to Prudential for failure to procure defendant's consent to the assignments and (2) the reconveyance by Prudential to CMD, which plaintiffs argue was a rescission of the original sale of the parcels and relates back to the time CMD transferred them to Prudential.[1] In an unpublished memorandum, the District Court held that basing an insurable interest upon CMD's failure to perform

> "would serve to deprive the insurance company of its right to consent to any assignment as provided for expressly in the insurance policy, and would serve to exculpate the transferor from liability for its own misfeasance or breach of contract with the transferee at the expense of the insurance company."

The court also found the second argument "to be without merit," and entered judgment for the insurer. We reverse on the basis of plaintiffs' first argument.

We find no authority in Illinois law to support the District Court's view. The existence of an insurable interest in the named insured does not depend upon whether the insurer could have refused to consent to an assignment of the policy to another insured, or whether the named insured breached an obligation

1. A third theory, that CMD's contract with Prudential to manage the properties gave CMD the requisite interest to insure them, was raised for the first time on appeal and therefore comes too late. We note in passing, however, that such a limited interest would not support the damages which plaintiffs seek, because recovery is limited to the extent of actual interest. *Chicago Title & Trust Co.* v. *United States F. & G. Co.*, 511 F. 2d 241, 247 (7th Cir. 1975); see 3 *Couch on Insurance* 2d § 24:2.

to a third party.[2] All that is necessary is an " 'interest in property by the existence of which [the insured] receives a benefit, or by the destruction of which he will suffer a loss' . . . . 'That the person may suffer loss is a sufficient foundation for his claim to an insurable interest.' " *Home Insurance Co.* v. *Mendenhall,* 164 Ill. 458, 464-465, 45 N. E. 1078, 1079-1080 (1897).[3] See also *Lieberman* v. *Hartford Fire Insurance Co.,* 6 Ill. App. 3d 948, 949, 287 N. E. 2d 38, 40 (1st Dist. 1972). The law elsewhere is in accord. See 3 *Couch on Insurance* 2d § 24:13; *Parks* v. *Federal Crop Insurance Corp.,* 416 F. 2d 833, 839 (7th Cir. 1969). Neither legal title nor possession is required. *Beddow* v. *Hicks,* 303 Ill. App. 247, 258, 25 N. E. 2d 93, 98 (3d Dist. 1940); *Welch* v. *Northern Assurance Co.,* 223 Ill. App. 77, 83 (1st Dist. 1921). Thus Illinois courts have held that an insurable interest exists in a variety of situations in which the insured lacks either title or possession, or both. *Griffin* v. *Pfeffer Lumber Co.,* 285 Ill. 19 (1918) (lessee of real estate); *Danvers Mutual Fire Insurance Co.* v. *Schertz,* 95 Ill. App. 656 (3d Dist. 1900) (owner of equitable title); *Whelan* v. *Massachusetts Bonding & Insurance Co.,* 205 Ill. App. 122 (2d Dist. 1917) (mortgagor and mortgagee of same property); *Home Insurance Co.* v. *Peoria & P. U. R. Co.,* 178 Ill. 64, 52 N. E. 862 (1899) (bailee); *Welch* v. *Northern Assurance Co., supra,* 223 Ill. App. 77 (shareholders in a solvent company). The reason for the require-

2. As is customary, the policy does not specify the kind of interest the insured must have in the insured property in order to recover but leaves that to the law. The policy provides, *inter alia,* that defendant insures CMD

> "to the extent of the actual cash value of the property at the time of the loss, but not exceeding the amount which it would cost to repair or replace the property . . . against all direct loss by fire . . . to the property described herein while located or contained as described in this policy. . . ."

3. The first quotation within a quotation is from Justice Gray's opinion in *Eastern R. Co.* v. *Relief Fire Ins. Co.,* 98 Mass. 420. 423 (1868). The second is from *May on Insurance,* § 80, at 87.

ment of an insurable interest is "to prevent the use of insurance for illegitimate purposes. It should not be extended beyond the reasons for it by excessively technical construction." *Womble* v. *Dubuque Fire & Marine Insurance Co.,* 310 Mass. 142, 147, 37 N. E. 2d 263, 266 (1941), quoted with approval and followed by this court in *Lititz Mutual Insurance Co.* v. *Lengacher,* 248 F. 2d 850, 853 (7th Cir. 1957).

Accordingly, if CMD might have suffered a loss by reason of the destruction of the property, it had an insurable interest. CMD argues that there was such a risk of loss arising from the undertaking to forward the executed assignment of the insurance policy to the insurer and to obtain the latter's consent. That undertaking created a duty to forward the assignment and seek the insurer's consent and to notify Prudential if consent was not obtained. Because of its breach of this duty, CMD argues, it was liable to Prudential when the insured property burned, and CMD therefore had an insurable interest.

The defendant insurer's strongest response to CMD's argument is based on several early cases, one decided by an Illinois court, in which the liability of sellers for failure to effect transfers of insurance on the property sold was limited to the value of the policy before the fire.[4] This argument relates, of course, to the amount of the insurable interest, not to its existence, but we are in any event not persuaded that these cases should control here. The Illinois case is easily distinguishable,[5] and,

4. *Davis* v. *Osborn,* 159 Ill. App. 283 (3d. Dist. 1910); *Dodd* v. *Jones,* 137 Mass. 322 (1884); *Elfenbein* v. *Abbondanza,* 64 Misc. 176, 118 N. Y. S. 1073 (1909); *Williams* v. *Meyers,* 144 Okla. 24, 289 P. 294 (1930); *United States Bond & Mortgage Corp.* v. *Berry,* 249 Ky. 610, 61 S. W. 2d 293 (1933).

5. *Davis* v. *Osborn, supra,* note 4, refused to impose liability on the seller, who had merely agreed to assign the policies and had assigned them. Instead of immediately sending the assigned policies to the insurer for approval of the assignments, the seller, with the buyer's knowledge, had placed them in a safe over the

(Continued on next page)

whether or not the others represent the present law elsewhere, they are not in our opinion consistent with the principles applied in analogous Illinois cases in recent years.

The liability of CMD to Prudential is analogous to the liability of an insurance broker to a customer for negligent failure to perform an agreement to procure insurance. *Roberson* v. *Knupp Insurance Agency*, 125 Ill. App. 2d 373, 377, 260 N. E. 2d 849, 851 (5th Dist. 1970); *Johnson* v. *Illini Mutual Insurance Co.*, 18 Ill. App. 2d 211, 216, 151 N. E. 2d 634, 637 (3d Dist. 1958). Whether the action against the broker sounds in tort based on negligence, as contended by defendant and as suggested by *Talbot* v. *Country Life Insurance Co.*, 8 Ill. App. 3d 1062, 1065, 291 N. E. 2d 830, 832 (3d Dist. 1973), or in contract for failure to perform the agreement to procure, as *Foley* v. *Wolfie, Steffelin & Co.*, 232 Ill. App. 333, 339 (1st Dist. 1924), would indicate, makes little difference. In either case, Illinois courts have consistently held that the broker's liability covers the full extent of the loss, up to the limits of the policy the broker agreed to procure. *Gothberg* v. *Nemerovski*, 58 Ill. App. 2d 372, 383, 208 N. E. 2d 12, 19 (1st Dist. 1965); *Welch* v. *Northern Assurance Co., supra*, 223 Ill. App. at 81. The liability is based, not upon the agency-principal relationship of a broker and client, but upon the broker's failure to perform an obligation. See *Evan L. Reed*

(Continued from preceding page)

holiday on which the fire occurred. After holding that the buyer had no cause of action in trespass on the case against the seller under these circumstances, the court then went on in dictum to say,

> "The only damage that [the buyer] could possibly have recovered against [the seller] would have been the amount that [the buyer] would have been required to pay in securing policies of like amount upon the stock of merchandise and there is no proof as to any such damage in the record." 159 Ill. App. at 286.

This statement must be read with the court's view of what the seller's obligation was, *viz.*, merely to assign the policies.

Manufacturing Co. v. *Wurts*, 187 Ill. App. 378, 386 (1st Dist. 1914). Because the broker in such a case would be liable to the purchaser for the loss if the property were destroyed, he has an insurable interest in it. See 3 *Couch on Insurance* 2d § 24:13.

Like a broker asked to obtain renewal of a policy, CMD did not agree to insure the property but did agree to seek continuation of the insurance. And, like such a broker, CMD undertook responsibility for obtaining the insurer's agreement to continue to insure the risk. We perceive no reason why the liability of CMD to Prudential should not be the same as that of the broker to his customer, and we believe an Illinois court would hold that it is the same. If we are right, it follows that CMD has an insurable interest to the extent of that liability.

Whether the defendant insurer would have consented to the assignment is immaterial, just as, in the case of the broker who has agreed to seek renewal of a policy, it is immaterial whether the insurer would renew the policy. Inherent in the obligation to seek continuation of an insurance policy is the duty to notify the applicant if the insurer declines to continue the risk, so the applicant "may not be lulled into a feeling of security or put to prejudicial delay in seeking protection elsewhere." *Talbot* v. *Country Life Insurance Co., supra*, 8 Ill. App. 3d at 1065, 291 N. E. 2d at 832. If the insurer would not have consented to the assignment of the policy, CMD would have learned of that fact upon requesting consent. It could then have notified Prudential accordingly so the latter could obtain coverage elsewhere. CMD's inaction thus caused damage to Prudential whether or not the defendant insurer would have consented to the assignment. This case can be decided therefore without deciding whether consent would have been withheld.[6]

6. Nothing in the record suggests any reason why the defendant would not have give its consent. The contention made at oral argument that consent might have been withheld was based on matters outside the record. It appears from the record that defendant did consent to the assignments of policies covering certain other property involved in the sale.

Nor is CMD's right to recover under the policy impaired by the possible existence of a defense against Prudential based on the latter's failure to make inquiry concerning the delay in delivery of the consent. An insured's exposure to loss need not be certain or reduced to judgment to give him an insurable interest. When he in good faith settles a claim covered by insurance, the amount paid in settlement is recoverable from the insurer. *Kinnan* v. *Charles B. Hurst Co.*, 317 Ill. 251, 256-260, 148 N. E. 12, 14-16 (1925); *Loeber Motors, Inc.* v. *Sims*, 34 Ill. App. 3d 342, 348-349, 340 N. E. 2d 132, 136-137 (1st Dist. 1975); *Crest* v. *State Farm Mutual Automobile Insurance Co.*, 20 Ill. App. 3d 382, 387, 313 N. E. 2d 679, 683 (2d Dist. 1974). The net cost to CMD of the settlement with Prudential is the amount of CMD's loss caused by fire.

We reject defendant's argument that CMD's loss is an "indirect" loss and therefore not covered by the policy. The policy requires a "direct loss by fire . . . to the property." (See note 2, *supra*.) The words "direct loss" do not refer to the reason the fire caused loss to CMD but to the relationship between the fire and the damage or destruction to property. As we said above, the policy does not limit the kind of insurable interest the insured must have in order to recover.

The judgment of the District Court is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B.

W. WOOD PRINCE and JAMES F. DONOVAN, as Trustees of the Central Manufacturing District,

Plaintiffs,

v.

ROYAL INDEMNITY COMPANY,

Defendant.

No. 73 C 3195.

United States District Court,
N. D. Illinois, E. D.
Dec. 2, 1975.

Action was brought by named insured against fire insurer to recover on fire policy. The District Court, Lynch, J., held that where named insured transferred by deed pursuant to real estate agreement its right, title and interest in insured property to purchaser, and immediately thereafter undertook to procure consent from fire insurer to assignment of its rights under fire policy, which expressly stated that assignment would not be valid without insurer's written consent, to purchaser but failed to obtain such assignment, named insured lost any insurable interest in property as of time of delivery of deed.

Judgment for insurer.

1. Insurance 123

Where named insured transferred by deed pursuant to real estate agreement its rights, title and interest in insured property to purchaser, and immediately thereafter undertook to procure

consent from fire insurer to assignment of its rights under fire policy, which expressly stated that assignment would not be valid without insurer's written consent, to purchaser but failed to obtain such assignment, named insured lost any insurable interest in property as of time of delivery of deed.

2. Insurance 115(6)

In light of express provision for written consent of fire insurer to any assignment of rights under policy and insured's total failure to seek insurer's consent to assignment of policy benefits to purchaser following transfer of property by deed to purchaser, supposed liability of named insured to purchaser for fire damage to property was not tantamount to creation of insurable interest in named insured.

3. Insurance 115(1)

Insurable interest must exist in property which is sought to be insured against loss by fire, or arise from some direct relationship to property sought to be insured; such interest cannot arise from facts wholly extraneous to and separate from destroyed property.

Gerald E. Grashorn and Stephen C. Bruner, of Winston & Strawn, Chicago, Ill., for plaintiffs.

John P. Gorman, of Clausen, Miller, Gorman, Caffrey & Witous, Chicago, Ill., for defendant.

MEMORANDUM OF DECISION

LYNCH, District Judge.

This is an action brought by the plaintiff to recover on a fire insurance policy issued by defendant. Jurisdiction in this Court is based on diversity, 28 U. S. C. Section 1332. The parties

have submitted a stipulation of facts and having waived a trial of the issues, seek this Court's decision based on the stipulation of facts as to which party is entitled to judgment. A summary of the parties' stipulation of facts follows:

Plaintiffs W. Wood Prince and James F. Donovan are and have been trustees of the Central Manufacturing District since before 1950. The Central Manufacturing District (hereinafter referred to as CMD) has been and presently is engaged in the business of purchasing and developing industrial real estate. Having developed real estate for industrial purposes, CMD would either sell that property to a purchaser, or lease the property to a tenant and manage it for the period of tenancy, receiving income for its managing services for the benefit of CMD's shareholders.

In 1958, a subsidiary of CMD acquired title to certain real estate located in an area of Chicago, Illinois, known as the "Crawford Industrial Development." This real estate was transferred to the trustees in 1965. Included in this real estate were two parcels which, at a later date, the trustees improved by the erection of a A & P grocery warehouse on one lot and a A & P grocery garage on a second lot. At all times relevant hereto, A & P leased these two pieces of property for the purposes of maintaining a warehouse to store canned food stuff and a garage to store and repair automobiles and trucks owned and operated by A & P.

In June or July of 1971, a representative of Goldman, Sachs inquired as to whether CMD would be interested in selling a large number of its real estate holdings to an insurance company on a cash basis. Eventually, Goldman, Sachs produced the Prudential Insurance Company of America (hereinafter referred to as Prudential) as a prospective purchaser of some of CMD's property. After lengthy negotiations, CMD and Prudential entered into an agreement dated November 22, 1972, by which Prudential agreed to purchase 69 separate and distinct parcels of CMD real estate. Of these 69 parcels, 64 were oc-

cupied by tenants pursuant to leases with CMD, and 5 parcels were vacant buildings. Included in the 69 parcels were the two parcels leased to A & P for the warehouse and garage. As to these two parcels, CMD had arranged for the purchase of fire insurance policies and paid the premium long prior to the November 22, 1972 agreement.

On November 22, 1972, a meeting (the first closing) was held between representatives of CMD and Prudential for the purpose of transferring title to 33 of the 69 parcels of real estate. At that meeting CMD's representatives produced and delivered a "Seller's Deed" which conveyed the 33 parcels to Prudential. Together with that deed, CMD delivered letters of opinion concerned with the condition of title of the parcels, leases, executed assignments of leases, various types of notices to each tenant occupying the premises, evidences of existence of fire insurance and executed assignments to Prudential of the interest of CMD in the fire insurance policies. Having examined these documents, the representative of Prudential pushed the evidences of fire insurance and the executed assignments of the policies to Prudential across the conference table to representatives of CMD, with the request for them to take care of delivering the assignments of the insurance policies to the proper insurance carriers for approval and acceptance. After receiving Prudential's check for the purchase price of these 33 parcels, the representatives of CMD agreed to comply with Prudential's request for them to take care of delivering the assignments of the insurance policies to the carriers for their consent.

The evidence of fire insurance and the executed assignments thereof were carried by representatives of CMD to CMD's office and were delivered to CMD's insurance manager with instructions to deliver the assignments to the proper insurance companies or their agents and arrange to have the various insurance companies accept the assignments. Pursuant to these instructions CMD's insurance manager forwarded these assignments to the various insurance companies.

On December 15, 1972, a meeting (the second closing) was held between the same parties for the purpose of transferring title to 17 of the 69 parcels from CMD to Prudential. At this meeting, business was transacted in substantially the same manner as in the November 22, 1972 meeting. After the meeting adjourned representatives of CMD delivered the evidences of fire insurance and executed assignments thereof to CMD's insurance manager with instructions to deliver the assignments to the proper insurance companies or their agents and arrange to have the various insurance companies accept the assignments. However, CMD's insurance manager forwarded and received acceptance of only 3 of the 17 assignments, contrary to the instructions given to him.

On December 19, 1972, a third closing meeting was held for the purpose of transferring title to 1 of the 69 parcels from CMD to Prudential. Again business was transacted in a manner substantially similar to that in the prior two closings, and again CMD's insurance manager failed to follow instructions and forward the executed assignment wherein CMD assigned its interest in the insurance policy to Prudential to the proper insurance company for acceptance of the assignment.

On January 4, 1973, a fourth closing meeting was held for the purpose of transferring title to the last 18 of the 69 parcels of real estate from CMD to Prudential. Among the 18 parcels were the grocery warehouse and grocery garage leased to A & P. The transactions at the meeting took virtually the same form as the previous transactions. Again CMD's insurance manager, contrary to instructions, failed to forward to the proper insurance companies for acceptance the executed assignments of CMD's interest in the fire insurance policies to Prudential.

The two parcels of real estate on which were located the A & P grocery warehouse and garage were insured by CMD through defendant Royal Indemnity Company. The lease between CMD and A & P did not require the tenant to furnish and pay the fire insurance for the protection of the owner, CMD. Con-

sequently CMD itself purchased the fire insurance policies and paid the premiums thereon. At the fourth closing representatives of CMD produced an assignment executed by the trustees of CMD of the insurance policy covering the two parcels leased to A & P. The grocery warehouse scheduled in the policy was insured against fire damage in the amount of $2,400,000, and the grocery garage, also scheduled in the same policy, was insured for $240,000. As mentioned previously, the assignment of CMD's interest in this policy to Prudential was never delivered to defendant Royal Indemnity for its acceptance. Royal Indemnity has never consented to the assignment.

On May 27, 1973, a fire occurred in the Crawford Industrial Development. Among the buildings destroyed or damaged were the two buildings insured under the Royal Indemnity Policy. The A & P grocery warehouse was completely destroyed, with a loss at least equal to the insurance in the sum of $2,400,000. The A & P grocery garage was damaged by the fire in the amount of $15,720. CMD notified Royal Indemnity's agents of the damage on May 27, 1973. After investigation by Royal Indemnity and its attorneys, CMD received a letter dated June 29, 1973, from Royal Indemnity in which the insurance company denied any liability for the loss due to the fire, giving as its reason that CMD's insurable interest terminated on January 4, 1973. Royal Indemnity also enclosed a check representing the return premium applicable to the two damaged or destroyed buildings. CMD returned this check and pressed its claim for the damaged property.

Counsel have stipulated, in substance, to the above outlined set of facts. The following facts are also stipulated to by counsel. However, defendant Royal Indemnity contends that they are irrelevant and immaterial.

At the first closing (November 22, 1972), one of the properties conveyed to Prudential was occupied by Vin-Tex Sealers, Inc., pursuant to a lease which required Vin-Tex Sealers to purchase fire insurance and pay the premium therefor, naming

CMD as an insured. Vin-Tex purchased insurance from Royal Indemnity. Among the documents produced by CMD at the closing were a memorandum of this insurance and an executed assignment of CMD's interest therein. CMD's insurance manager, pursuant to direction, sought Royal Indemnity's acceptance of this assignment, which was received.

It wasn't until three days after the fire that CMD discovered that some or all of the assignments of fire insurance policies covering parcels transferred to Prudential at the last three closing dates were not forwarded to the respective insurance companies for their acceptance, but were still in CMD's possession. Having discovered this failure, CMD immediately sought acceptances of these assignments which were received from various insurance companies with the exception of Royal Indemnity, which refused to accept assignments of insurance policies covering the A & P properties, as well as property occupied by A-1 Tire Company under a lease from CMD. Through its agent, Corroon & Black, Royal Indemnity refused to accept the assignment of the A-1 insurance policy. Corroon & Black, as brokers, arranged for interim insurance on the A-1 property through a binder with another insurance company.

The stipulation also contains a photocopied page of a pamphlet used in training of employees of Royal Indemnity. The page deals with an explanation of insurable interest.

The stipulation further indicates that on June 5, 1973, representatives of CMD and Prudential met, at which time Prudential was advised that at the time of the fire CMD had not delivered the assignments of fire insurance on the A & P warehouse and grocery garage to Royal Indemnity, and that Royal Indemnity had not consented to the assignments before the fire. Prudential was further advised that Royal Indemnity denied any liability under the insurance policies for the reasons that Prudential was not a named insured and that CMD had no insurable interest. CMD and Prudential, after individual investigations by counsel as to CMD's liability to Prudential, then entered

into an agreement whereby CMD returned the purchase price to Prudential for the two A & P properties, and Prudential deeded the properties back to CMD.

The complaint seeks a judgment under the policy for $2,415,729.00, plus interests, costs, and attorney's fees. That figure represents $2,400,000 for the total loss of the A & P grocery warehouse, and $15,729.00 for damages to the A & P grocery garage.

The issue that must be decided by this Court may be stated as follows: Whether CMD, having previously transferred title on January 4, 1973, to Prudential, and having failed to procure an acceptance of the assignment of rights under the fire insurance policy from CMD to Prudential, had an insurable interest in the two A & P properties at the time of the fire on May 27, 1973, such that it may recover under the terms of the fire insurance policy. Inasmuch as the property insured is located in Illinois, and it appears that the contract of insurance was entered into in Illinois, Illinois law will govern the determination of this issue.

Plaintiff contends that when the representatives of CMD agreed to procure acceptances of assignments of CMD's interest in the fire insurance policy to Prudential, CMD became liable to Prudential for the value of that policy for which CMD failed to seek an acceptance of the assignment. It is plaintiff's contention that when the fire destroyed the A & P grocery warehouse and damaged the A & P grocery garage, CMD became liable for those losses to Prudential because CMD falied to perform its part of the oral contract with Prudential to acquire Royal Indemnity's consent to the assignment. By virtue of this putative liability, plaintiff claims to fail within the ambit of the definition of insurable interest.

For many years the law in Illinois has been settled that a party has an insurable interest in property from the existence of which he receives a benefit or from the destruction of which he will suffer a pecuniary loss, although he has no title to or

possession of the premises. *Home Ins. Co.* v. *Mendenhall,* 164 Ill. 458, 45 N. E. 1078; *Beddow* v. *Hicks,* 303 Ill. App. 247, 25 N. E. 2d 93.

Plaintiff's brief cites numerous cases standing for the proposition that where a vendor agrees to procure insurance for the property of the vendor and fails to do so, the vendor has an insurable interest in that property. Those cases are distinguishable from the present at least to the extent that in the present case the fire insurance was already procured, and the vendor failed to perform its promise to seek the consent to the assignment of a third party wholly distinct from the parties to the transaction.

While it is true that an insurable interest is predicated upon the economic benefit of the continuing existence of the property in question, or the economic loss due to the destruction of the property, that statement of the law, standing by itself, is inapplicable in light of the additional facts presented in this case as well as other rules of law relating to an insurance carrier's right to consent to assignments of its policies.

On the face of the policy issued by Royal Indemnity to CMD covering the warehouse and garage is the legend: "Assignment of this policy shall not be valid except with the written consent of this Company." Courts have uniformly upheld such express provisions in a fire insurance policy. See *Pfeffer* v. *Farmers State Bank of Schaumberg,* 263 Ill. App. 360; *Klefstad* v. *Anderson Centry Ins. Co.,* 207 F. 2d 288 (7th Cir. 1953). In the part of the stipulation contended by defendant to be irrelevant and immaterial, plaintiff offers evidence that after the first closing Royal Indemnity issued an acceptance of an assignment of a fire insurance policy covering the Vin-Tex property, and further that other insurance companies routinely accepted assignments of policies after CMD discovered its insurance manager had failed to forward those assignments for acceptance. Apparently, plaintiff seeks to establish an inference that Royal Indemnity would have routinely accepted an assignment from CMD to Prudential, had those assignments been promptly forwarded for

acceptance, and that the only reason Royal Indemnity refused to consent to the assignment was that the subject matter of the policy was destroyed. The Court finds that evidence of what the defendant would or would not have done is irrelevant, in light of the simple fact that the defendant never consented to the assignment either prior to or after the fire of May 27, 1973.

[1] In light of the facts stipulated to and the applicable law, this Court holds that where a named insured, under the terms and conditions of a fire insurance policy, transfers by deed pursuant to a real estate agreement all of its right, title and interest in the property covered by the insurance policy to a transferee, and immediately thereafter undertakes to procure a consent from the insurer to an assignment of its rights under the policy to the transferee, and then fails to perform that undertaking, the named insured will be deemed to have lost any insurable interest in the property covered by the insurance policy as of the time of delivery of the deed. A rule of law, such as that proposed by the plaintiff which would create an insurable interest in the transferor by virtue of his liability to the transferee for failure to perform his undertaking to procure an insurance company's consent to an assignment would serve to deny the insurance company of its right to consent to any assignment as provided for expressly in the insurance policy, and would serve to exculpate the transferor from liability for its own misfeasance or breach of contract with the transferee at the expense of the insurance company.

[2, 3] In light of the express provision for the written consent of the insurance company to any assignment of rights under a policy, and in light of the insured's total failure to perform its promise to seek the insurance company's consent to the assignment, the supposed liability of CMD to Prudential is not tantamount to the creation of an insurable interest in CMD. An insurable interest must exist in the property itself, or arise from some direct relationship to the property sought to be insured. The interest cannot arise from facts wholly extraneous to and separate

from the destroyed property—an insurable interest in CMD in the destroyed property cannot arise by virtue of CMD's own misfeasance in performing its undertaking to procure Royal Indemnity's consent to the assignment of CMD's rights under the policy to Prudential.

For the above reasons, the Court holds that CMD's insurable interest in the A & P grocery warehouse and A & P grocery garage terminated on January 4, 1973, the date on which CMD transferred by deed the property to Prudential. This interest terminated not because title was transferred, but rather because CMD failed to perform its promise to obtain Royal Indemnity's consent to the assignment, and CMD cannot now, after the property has been destroyed, exculpate itself from liability for its own misfeasance at the expense of Royal Indemnity. Having so held, this Court finds plaintiff's argument that a recission between CMD and Prudential served to reinstate an insurable interest in CMD with respect to the destroyed property to be without merit.

Accordingly, for the above mentioned reasons, the Court finds for the defendant on the stipulation of facts, and judgment is hereby entered in favor of defendant Royal Indemnity Company.

/s/ WILLIAM J. LYNCH,
Judge, United States
District Court.

Dated: December 2, 1975.

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

W. WOOD PRINCE and JAMES F. DONOVAN, as Trustees of the Central Manufacturing District,
Plaintiffs,
vs.
ROYAL INDEMNITY COMPANY,
Defendant.

No. 73 C 3195

STIPULATION OF FACTS.

The plaintiffs (hereinafter referred to as "CMD") and the defendant (hereinafter referred to as "ROYAL"), by their respective attorneys, hereby stipulate that the following facts are relevant and material and are true and correct:

1. That the plaintiffs are citizens of the State of Illinois and the principal place of business of CMD is in the State of Illinois.

2. That the defendant is a corporation, organized and existing under the laws of the State of New York, and the principal place of business of said defendant is in the State of New York.

3. That the defendant is licensed to sell insurance within the State of Illinois and maintains an office and does business in Chicago, Illinois.

4. That the amount in controversy, exclusive of interest and costs, is in excess of $10,000, and the United States District Court for the Northern District of Illinois, Eastern Division, has jurisdiction of the parties and the matter in controversy.

5. That the plaintiffs, W. Wood Prince and James F. Donovan, are Trustees of CMD and have been the Trustees operating said company since prior to 1950.

6. That at all times material to this litigation each of the named Trustees had authority to act with or without a meeting and the act of either of the Trustees was valid and binding and considered to be the action of the Trustees, and that all documents executed by either of the Trustees were valid and as effectual and binding as if executed by both of the Trustees.

7. That for many years prior to 1950, and up to the present time, CMD's principal business has been and is the purchase and development of industrial real estate, and either selling said improved property to a purchaser or leasing said property to a tenant and managing the same during the period of tenancy, receiving the income therefrom for the benefit of the shareholders of CMD.

8. In 1958, the then Trustees, through a subsidiary, acquired title to certain real estate located in Cook County, in an area of Chicago known as the "Crawford Industrial Development," which real estate was transferred to the Trustees during 1965. Included in said real estate were two parcels which, at a later date, were improved by the Trustees by the erection of an A&P grocery warehouse on one lot and an A&P grocery garage on the second lot, designated as parcels No. L29 and L30, respectively, both of which properties were leased to the A&P by the Trustees of CMD, and were still so leased by Prudential (purchaser from CMD) on May 27, 1973, on which date a fire occurred destroying or damaging several buildings in the Crawford Industrial Development, including the said A&P grocery warehouse and the A&P grocery garage. At all times during the duration of the lease (1966 to the date of the fire May 27, 1973), the warehouse was used by the A&P to store canned food stuff and the garage was used to store and repair automobiles and trucks owned and operated by the A&P and from the time the A&P leased said properties until January 4, 1973 when said properties were sold

to Prudential, the CMD managed the properties for the benefit of the shareholders of CMD and after January 4, 1973 CMD managed said properties for the benefit of Prudential. No change of any character was made after the sale of the properties on January 4, 1973 with respect to the use of the buildings by A&P or with respect to the management of the buildings by CMD.

In addition to the "Crawford Industrial Development," the CMD owns and has developed and manages industrial districts in other parts of Illinois, one of which is located in Kane County and known as the "St. Charles Industrial Development," another being located in Du Page County and known as the "Itasca Industrial Development," and including properties in other States of the Union, one of which is Texas.

9. That in June or July 1971 a representative of Goldman, Sachs contacted Mr. James F. Donovan, one of the Trustees of CMD, and made inquiry as to whether CMD would be interested in selling a large number of its real estate holdings to an insurance company on a cash basis. Donovan advised Goldman, Sachs that while there was no strong desire to dispose of any CMD properties, they would be interested in a sale based upon valuations acceptable to CMD. Goldman, Sachs eventually produced The Prudential Insurance Company of America (hereinafter referred to as "Prudential") as a prospective purchaser of CMD properties and during the first ten months of 1972 the representatives of Prudential and of CMD carried on negotiations for the purchase and sale of CMD properties which culminated in an agreement dated November 22, 1972, by which agreement Prudential agreed to purchase 69 separate and distinct parcels of CMD real estate and CMD agreed to sell said parcels to Prudential (a copy of said Agreement and the exhibits attached thereto is attached hereto as Exhibit 1).

10. That of the 69 parcels of real estate being purchased by Prudential 5 parcels were vacant buildings and 64 were occupied by tenants pursuant to leases.

11. That for some years prior to November 22, 1972 CMD had arranged for the purchase of fire insurance policies and paid the premiums on the vacant buildings owned by it and on other buildings used by CMD in the operation of its business (including 5 parcels of real estate leased to the A&P). All other tenants occupying premises being sold to Prudential were occupied pursuant to leases which required the tenant to purchase fire insurance, pay the required premiums, and furnish CMD with evidence that insurance coverage was in existence which adequately protected the interest of CMD as the owner of the property.

12. On November 22, 1972 a meeting (the first closing) was held in the Office of Winston & Strawn for the purpose of transferring title to 33 of the 69 parcels of real estate being purchased by Prudential from CMD. Messrs. Donovan, Long, Berg, Rumbaugh and Rearick were present representing CMD, and Messrs. Hitt and Rebholz were present representing Prudential. That at said meeting the CMD representatives produced and delivered to the Prudential representatives "Seller's Deeds" transferring and conveying 33 parcels of real estate located in either the St. Charles or the Itasca Industrial Development in either Kane or Du Page County, Illinois, certain letters of opinion from the Chicago Title Insurance Company concerned with the condition of the title to said parcels of real estate, leases, executed assignments of leases, various types of notices to each tenant occupying said premises, evidences of the existence of fire insurance, and executed assignments to Prudential of the interest of CMD in said insurance policies.

That all of the documents were examined, and checked against a checklist, and approved by Mr. Hitt, the attorney representing Prudential, in the presence of Mr. Rebholz and the representatives of CMD. That after so examining the documents he (Hitt) pushed the evidences of fire insurance and the executed assignments wherein CMD assigned its interest in said policies to Prudential across the conference table to Messrs. Rumbaugh and Berg with the request for them to take care of delivering the

assignments of the insurance policies to the proper insurance carriers for approval and acceptance. Mr. Hitt then delivered to Mr. Donovan a check issued by Prudential covering the purchase price of the 33 parcels; Messrs. Rumbaugh and Berg accepted redelivery of the evidences of fire insurance and the executed assignments of said policies and agreed to comply with Mr. Hitt's request. The meeting adjourned.

The evidences of fire insurance and the executed assignments thereof were carried by either Mr. Berg or Mr. Rumbaugh from the meeting room to the Office of CMD. The evidences of fire insurance and the executed assignments thereof were delivered to the CMD insurance Manager, John S. Sproul, with instructions to deliver the assignments to the proper insurance companies or their agents and arrange to have the various insurance companies accept the assignments. Pursuant to said instructions the said Sproul did forward the various assignments to the designated insurance companies.

13. On December 15, 1972 a meeting (the second closing) has held in the Office of Winston & Strawn for the purpose of transferring title to 17 of the 69 parcels of real estate being purchased by Prudential from CMD. Messrs. Berg, Rumbaugh and Rearick were present representing CMD, and Mr. Hitt was present representing Prudential. That at said meeting the CMD representatives produced and delivered to the Prudential representative "Seller's Deed" transferring and conveying 17 parcels of real estate, one parcel being located at 51st and Hamlin Streets in Chicago, Illinois, and the balance of said parcels being located in either the "Morgan Industrial Development" or in the "Original East District" in Cook County, Illinois, certain letters of opinion from the Chicago Title Insurance Company concerned with the condition of the title to said parcels of real estate, leases, executed assignments of leases, various types of notices to each tenant occupying said premises, evidences of the existence of fire insurance, and executed assignments to Prudential of the interest of CMD in said insurance policies.

That all of the documents were examined and checked against a checklist, and approved by Mr. Hitt, the attorney representing Prudential, in the presence of the representatives of CMD. That after so examining the documents he (Hitt) pushed the evidences of fire insurance and the executed assignments wherein CMD assigned its interest in said policies to Prudential across the conference table to Messrs. Rumbaugh and Berg with the request for them to take care of the details of delivering the assignments of the insurance policies to the proper insurance carriers for approval and acceptance. Mr. Hitt then delivered a check issued by Prudential covering the purchase of the 17 parcels; Messrs. Rumbaugh and Berg accepted redelivery of the evidences of fire insurance and the executed assignments of said policies and agreed to comply with Mr. Hitt's request. The meeting adjourned.

The evidences of fire insurance, the executed assignments thereof, notices to tenants, leases and assignments of leases were carried by either Mr. Berg or Mr. Rumbaugh from the meeting room to the Office of CMD. The evidences of fire insurance and the executed assignments thereof were delivered to the CMD Insurance Manager, John S. Sproul, with the same instructions to deliver the assignments to the proper insurance companies or their agents and arrange to have the various insurance companies accept the assignments. The said Sproul forwarded and received acceptance of only 3 of the assignments and, contrary to the instructions given to him after the second closing, and without knowledge of any personnel connected with CMD or Prudential, the balance of the assignments (14 in number) were still undelivered and unaccepted by the insurance companies as of May 31, 1973, after the fire occurred. However, none of the 17 parcels sold in the "second closing" were damaged or destroyed in the fire and therefore no claims arose on said policies. On or about May 30, 1973, CMD personnel discovered that Sproul had failed to carry out the instructions given to him after the second closing (12-15-72).

14. On December 19, 1972 a meeting (the third closing) was held in the Office of Winston & Strawn for the purpose of transferring title to 1 of the 69 parcels of real estate being purchased by Prudential from CMD. Messrs. Bremer, Berg and Rearick were present representing CMD, and Mr. Hitt was present representing Prudential. That at said meeting the CMD representatives produced and delivered to the Prudential representative a "Seller's Deed" transferring and conveying 1 parcel of real estate located in Dallas, Texas, letters of opinions from a Title Company concerned with the condition of the title to said parcel of real estate, lease, executed assignment of lease, various types of notices to the tenant occupying said premises, evidence of the existence of fire insurance, and executed assignment to Prudential of the interest of CMD in said insurance policy.

That all of the documents were examined, and checked against a checklist, and approved by Mr. Hitt, the attorney representing Prudential, in the presence of the representatives of CMD. That after so examining the documents he (Hitt) pushed the evidence of fire insurance and the executed assignment wherein CMD assigned its interest in said policy to Prudential across the conference table to Messrs. Bremer and Berg with the request for them to take care of delivering the assignment of the insurance policy to the proper insurance carrier for approval and acceptance. Mr. Hitt then delivered a check issued by Prudential covering the purchase price of the 1 parcel; Messrs. Bremer and Berg accepted redelivery of the evidence of fire insurance and the executed assignment of said policy and agreed to comply with Mr. Hitt's request. The meeting adjourned.

The evidence of fire insurance and the executed assignment thereof were carried by either Mr. Berg or Mr. Bremer from the meeting room to the Office of CMD. The evidence of fire insurance and the executed assignment thereof were delivered to the CMD Insurance Manager, John S. Sproul, with the same instructions to deliver the assignment to the proper insurance

company or its agent and arrange to have said insurance company accept the assignment and to furnish to CMD a notice of the acceptance. Contrary to said instructions and without the knowledge of any personnel connected with CMD or Prudential, the said Sproul did not forward the assignment to the designated insurance company, and said assignment was still undelivered and unaccepted by the said insurance company on May 31, 1973, after the fire occurred. However, said parcel of real estate sold in the "third closing" had not been damaged or destroyed and therefore no claim arose on said policy. On or about May 30, 1973, CMD personnel discovered that Sproul had failed to carry out the instructions given to him after the third closing (12-19-72).

15. On January 4, 1973 a meeting (the fourth closing) was held in the Office of Winston & Strawn for the purpose of transferring title to the last 18 parcels of the 69 parcels of real estate being purchased by Prudential from CMD. That among the 18 parcels included in this closing were:

(a) the A&P grocery warehouse located at 4404 West District Boulevard and the A&P grocery garage located at 4330 West 41st Street, both in the Crawford Industrial Development; these properties were occupied by the A&P pursuant to leases with the CMD. Neither of these leases contained a provision requiring the tenant (A&P) to furnish or pay for fire insurance on said property to protect the interest of the owner (CMD). CMD had insured these properties through the Royal Indemnity Company in successive policies since the completion of said buildings in 1966 and said properties were included in a policy of insurance No. RKF 63-53-78 issued by the Royal Indemnity Company identified therein as Item No. 3 and Item No. 5, respectively, which policy also covered various additional buildings located in its Chicago industrial developments as therein identified; said insurance having been directly bought by the CMD and the premiums due paid directly by the CMD (a copy of said policy being attached hereto as Exhibit 2).

Messers. Berg, Rumbaugh and Rearick were present representing CMD, and Mr. Hitt was present representing Prudential. That at said meeting the CMD representatives produced and delivered to the Prudential representatives a "Seller's Deed" transferring and conveying 18 parcels of real estate located in either the Crawford Industrial Development or the Kedzie Industrial Development in Cook County, Illinois, certain letters of opinion from the Chicago Title Insurance Company concerned with the condition of the title to said parcels of real estate, leases, executed assignments of leases, various types of notices to each tenant occupying said premises, evidences of the existence of fire insurance, and executed assignments to Prudential of the interest of CMD in said insurance policies. Among the evidences of insurance presented to the Prudential representative for inspection and approval was a policy issued by the Royal Indemnity Company bearing No. RKF 63-53-78, which named the Trustees of the Central Manufacturing District as the assured, which policy contained, among other things, a Schedule of Properties covered by the said policy, which schedule showed that the A&P grocery warehouse was included in said policy as Item No. 3 and insured for an amount of $2,400,000 with a 90% co-insurance provision, and the A&P grocery garage was included in said policy as Item No. 5 and insured for an amount of $240,000 with a 90% co-insurance provision (Exhibit No. 2).

Among the assignments of insurance produced by the CMD representatives at said closing were two assignments, executed by the Trustees of the Central Manufacturing District by James F. Donovan. Attached to one of such assignments was the cover page of Royal Indemnity Company Policy No. RKF 63-53-78 and a copy of the Schedule of Properties covered, with a red lining under the property identified as the A&P grocery warehouse, Item No. 3, which was insured for $2,400,000. Attached to the other assignment was the cover page of the same Policy No. RKF 63-53-78 and a copy of the same Schedule of Properties, with a red lining under the property identified as

the A&P grocery garage, Item No. 5, which was insured for $240,000 (copies of each assignment, cover page and Schedule of Properties covered being attached hereto as Exhibits Nos. 3, 4, 5, 6, 7, and 8, respectively).

That all of the documents were examined, including the aforementioned assignments of the Royal Indemnity Policy No. RKF 63-53-78, the cover page, and the Schedule of Properties covered and checked against a checklist, and approved by Mr. Hitt, the attorney representing Prudential, in the presence of the representatives of CMD. That after so examining the documents he (Hitt) pushed the evidences of fire insurance and the executed assignments wherein CMD assigned its interest in said policies to Prudential across the conference table to Messrs. Rumbaugh and Berg with the request for them to take care of the details of delivering the assignments of the insurance policies to the proper insurance carriers for approval and acceptance. Mr. Hitt then delivered a check issued by Prudential covering the purchase of the last 18 parcels; Messrs. Rumbaugh and Berg accepted redelivery of the evidences of fire insurance and the executed assignments of said policies and agreed to comply with Mr. Hitt's request. The meeting adjourned.

The evidences of fire insurance and the executed assignments thereof were carried by either Mr. Berg or Mr. Rumbaugh from the meeting room to the Office of CMD. The evidences of fire insurance and the executed assignments thereof were delivered to the CMD Insurance Manager, John S. Sproul, with the same instructions to deliver the assignments to the proper insurance companies or their agents and arrange to have the various insurance companies accept the assignments and to furnish to CMD a notice of the acceptance. Contrary to said instructions and without knowledge of any personnel connected with CMD or Prudential, the said Sproul did not forward any of the assignments to the designated insurance companies and said assignments were still undelivered and unaccepted by the various insurance companies as late as May 31, 1973. On or

about May 30, 1973, CMD personnel discovered that Sproul had failed to carry out the instructions given to him after the fourth closing (1-4-73).

16. Early on Sunday morning, May 27, 1973, a fire occurred in the Crawford Industrial Development of the CMD. Among the buildings destroyed or damaged were the two buildings insured under the Royal Indemnity Policy RKF 63-53-78, namely, the A&P grocery warehouse located at 4404 West District Boulevard, Chicago, which was destroyed (*see* picture taken after the fire, attached hereto as Exhibit No. 9) with a loss at least equal to the insurance in the sum of $2,400,000 provided for on that building (Item No. 3) in the Royal Indemnity Policy and the A&P grocery garage (Item No. 5) located at 4330 West 41st Street, Chicago, Illinois, which was damaged in the amount of $15,729.

17. Monday, May 28, 1973, was a legal holiday (Memorial Day) in the State of Illinois. On Tuesday, May 29, 1973, CMD notified Corroon & Black-Alexander & Company, General Agents for the Royal Indemnity Company, that in the fire which occurred on May 27, the A&P grocery warehouse was destroyed and the A&P grocery garage was damaged. On or about June 7, 1973, the Royal Indemnity Company and the General adjustment Bureau requested CMD to sign a Non-Waiver Agreement; CMD complied (a copy of the Non-Waiver Agreement is attached hereto as Exhibit No. 10). Pursuant to the request of the General Adjustment Bureau, certain documents and other information was furnished by CMD, as outlined in a letter dated June 29, 1973 to the General Adjustment Bureau (copy of which letter is attached hereto as Exhibit No. 11). Likewise, pursuant to the request of the attorneys (Messrs. Clausen, Hirsh, Miller & Gorman) representing the Royal Indemnity Company, the CMD furnished to said law firm copy of the Agreement dated November 22, 1972 between the Trustees of the CMD and Prudential, together with the copies of the exhibits attached thereto (*see* Exhibit No. 1).

18. On June 21, 1973, at the request of Mr. John P. Gorman of the law firm of Clausen, Hirsh, Miller & Gorman, CMD did produce at the Office of Clausen, Hirsh, Miller & Gorman:

> Messrs. John S. Sproul, Robert Schaefer, James Rumbaugh, Melvin Long, and John Berg

for the purpose of answering questions propounded by Mr. Gorman, under oath, with reference to the documents, closing procedures, and sale of the two parcels of real estate involved in this action.

19. That on July 2, 1973, there was delivered to the Office of CMD a letter dated June 29, 1973, signed by Mr. John M. Beres, Secretary of the Royal Indemnity Company, advising the CMD that that company (Royal Indemnity) denied any and all liability for loss sustained as a result of the fire which occurred on May 27, 1973, for the reason that CMD's insurable interest in the property terminated on January 4, 1973 and enclosed with the letter its check in the amount of $5,228.00 representing the return premium applicable to Item No. 3 and Item No. 5 for that period of the policy term subsequent to January 4, 1973. Copy of said letter is attached hereto as Exhibit 12. That immediately upon receipt of Exhibit 12 and the check enclosed therewith, CMD addressed a letter to the Royal Globe Insurance Companies and returned the above-mentioned check in the amount of $5,228.00 to the Royal Globe Insurance Companies, copy of said transmittal letter and receipt being attached hereto as Exhibit No. 13.

20. That on July 20, 1973, there was delivered to the Royal Indemnity Company sworn statements of Proofs of Loss by CMD. That thereafter, on August 10, 1973 Royal rejected and returned said Proofs of Loss to CMD and again denied any and all liability under its policy, exclusive of its return premium check in the sum of $5,228.00 for the reasons previously stated in its earlier letter of June 29, 1973, a copy of which is attached hereto as Exhibit No. 14.

APPENDIX D.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 22, 1976

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*

W. WOOD PRINCE and JAMES F. DONOVAN, as Trustees of the Central Manufacturing District,
Plaintiffs-Appellants,

vs.

No. 76-1061
ROYAL INDEMNITY COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 C 3195
William J. Lynch, *Judge.*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause, all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for rehearing in the above-entitled cause, be and the same is hereby, DENIED.